

① 89-1090

No.

Supreme Court, U.S. FILED NOV 20 1989 JOSEPH F. SPANIOL, JR. CLERK
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUTH ELLIS, Petitioner,

v

RINGGOLD SCHOOL DISTRICT, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Ruth Ellis
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Munhall, PA 15120
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Petitioner Pro Se



QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in only awarding Petitioner restitution in the form of back-pay for the years 1974 through 1978 instead of through 1985, the date of trial, absent any compelling reasons for such a limitation?

2. Whether the District Court abused its discretion in failing to order the reinstatement of Petitioner to her job with the Ringgold School District when it had been a squarely decided fact that Petitioner had been the victim of intentional employment discrimination by reason of her race?

LISTING OF PARTIES

The parties to the proceedings below were the petitioner Ruth Ellis and the respondent Ringgold School District.



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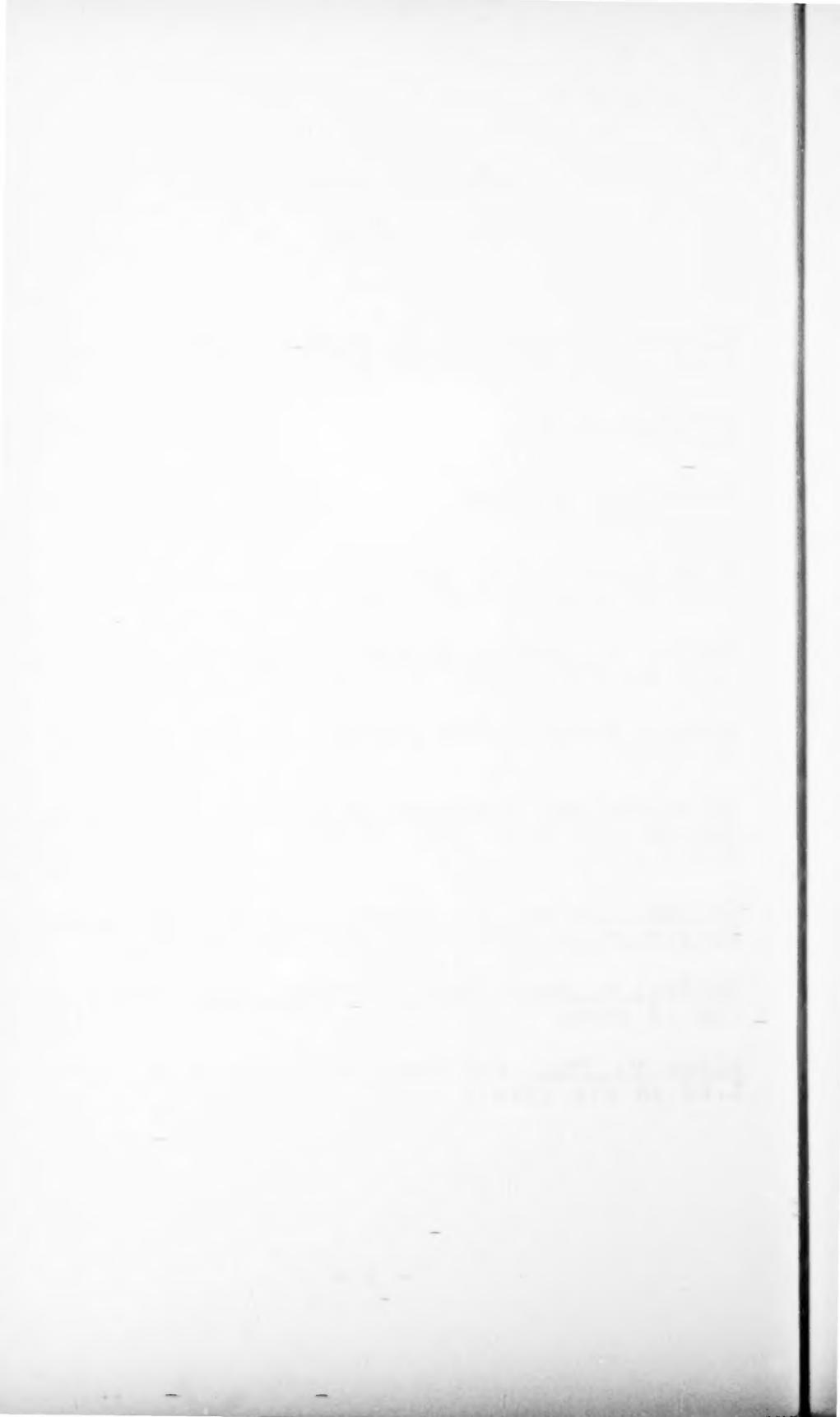
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUTH ELLIS, Petitioner,

v

RINGGOLD SCHOOL DISTRICT, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
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FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United
States:

The Petitioner, Ruth Ellis, respectfully
prays that a writ of certiorari issue to review
the judgment of the United States Court of
Appeals for the Third Circuit entered on May 15,
1989. Petitioner's appeal period was extended



for an additional ninety (90) days on August 22, 1989 due to some notice technicalities.

OPINIONS BELOW

The Court of Appeals entered its Memorandum decision affirming the denial of Petitioner's request for reinstatement to her employment on May 15, 1989. A copy of the memorandum opinion is printed in the Appendix beginning at page 1a. A copy of the order denying rehearing is printed in the Appendix beginning at page 5a. A copy of the opinion of Judge Gerald J. Webber, dated February 17, 1988, after remand from the United States Court of Appeals for the Third Circuit, is printed in the Appendix beginning at page 7a. A copy of the opinion of the Third Circuit on the first appeal to that Court is printed in the Appendix beginning at page 14a. A copy of the opinion of Judge Gerald J. Webber, dated January



14, 1987, is printed in the Appendix beginning at page 28a.

JURISDICTION

On May 15, 1989, the Court of Appeals entered judgment affirming the denial of Petitioner's request for reinstatement to her employment. Petitioner's timely petition for rehearing was denied by the Court of Appeals on August 22, 1989. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1)

STATUTE INVOLVED

This case involves the proper measure of damages when an employer is found to have discriminated against its employee under the



Civil Rights Act of 1964, promulgated at 42 U.S.C. 2000e-5.

STATEMENT OF THE CASE

This action was instituted by the appellant, Ruth Ellis, against the Ringgold School District for employment discrimination. The original complaint was filed on October 12th 1983. An amended complaint pleading claims for relief under Title VII for both racially motivated discrimination and retaliatory action for the filing of a charge with the EEOC was filed on January 13, 1984. In its answer to the petitioner's complaint, the Ringgold School District demanded a jury trial of the case.

The action came to trial on June 3, 1985. On June 5th, four special interrogatories were submitted to the jury. The questions, and the jury's answers thereto, were as follows:



1. Was the Plaintiff discriminated against because of her race, in employment by the Ringgold School District's failure to hire her as a permanent teacher in 1974-1977?

Answer: Yes

2. Was this discrimination purposefully directed against Plaintiff because of her race?

Answer: Yes

3. When did Plaintiff know or have reason to know that she was a subject of purposeful discrimination?

Answer: August 1976

4. Was Plaintiff reduced in employment because she filed an employment discrimination claim in 1976?

Answer: Yes

After the verdict was returned the jury was dismissed and the plaintiff was instructed to submit a claim for remedies, accompanied by evidentiary documents, setting forth her yearly



loss of earnings from 1974. Petitioner thereupon filed a statement of proposed remedies, requesting back-pay for the years 1974-1985 and reinstatement as a teacher with the Ringgold District.

On September 24, 1985, the District Court held a hearing on the remedial issues but did not enter a judgment order. Sixteen months then passed.

Finally, on January 14, 1987, the Court entered an order awarding Petitioner \$24,596.68 in back pay. Attorney's fees were also awarded. Neither the judgment order nor the Court's memorandum opinion addressed the question of Petitioner's reinstatement. A notice of appeal was then filed.

The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court in part and remanded for further findings. On remand, the District Court held



that the failure of the petitioner to mitigate her damages precluded reinstatement and any award of damages beyond what had already been awarded. The Third Circuit then affirmed this position, and denied rehearing. This petition followed.

REASONS FOR GRANTING WRIT

1. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE RULES PROMULGATED BY THE UNITED STATES SUPREME COURT

The petitioner, Ruth Ellis, should have been awarded back-pay for the years 1974 through the date of the trial action (June 1985), and it was an abuse of discretion for the District Court to limit the petitioner's recovery to the years 1974 through 1978.

To find the petitioner's earnings absent discrimination for each calendar year one merely divides the salaries paid for the portions of the



two school years within the particular calendar year by one-half and add the two quotients together. In other words, to calculate the earnings absent discrimination for the calendar year 1980 one would add 1/2 of the salary for the 1978-80 school year and 1/2 of the salary for the 1980-81 school year. From this sum one would subtract the petitioner's "actual earnings" for 1980 and the remainder would be the "measure of restitution" for 1980.

Upon applying this equation to each of the years at issue (1974-1985) and then totalling the losses sustained over this period, one arrives at a "total loss" of \$109,942.92. Such should have been the amount awarded the petitioner for her backpay losses.

The District Court never disputed the accuracy of the petitioner's analysis, finding that the data thereon, at least through 1979, was "reasonably accurate."



The United States Supreme Court enunciated the policies underlying the remedial provisions of Title VII in Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), by stating:

It is...the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. (45 L.Ed.2d at 297)

The Court proceeded to quote from a much earlier opinion:

"(t)he general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed." Wicker v. Hoppock, 6 Wall 94, 99, 18 L.Ed. 752 (1867) (45 L.Ed.2d at 297)

Regarding back-pay awards in Title VII cases the Court was very plain:

The power to award back-pay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national



proportions. A court must exercise this power "in light of the large objectives of the Act." (45 L.Ed.2d at 296)

Moreover - and in view of the finding of purposeful racial bias here, quite pertinent to the instant matter - the Court stated:

Where an employer has shown bad faith-by maintaining a practice which he knew to be illegal or of a highly questionable legality--he can make no claims whatsoever on the Chancellor's conscience.
(45 L.Ed.2d at 296)

Subsequent Supreme Court opinions have sustained the views and policies expressed in Albemarle, supra. Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); Ford Motor Co. v. EEOC, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982); Zipes v. TWA, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed. 2d 234 (1982).



Further, this Court has recognized the significance of the backpay remedy vis-a-vis the policies of Title VII. In Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (CA 3d 1983), the Court wrote:

The award of back pay is not left to the unbridled discretion of the trial court but instead has been made the presumptive remedy for employment discrimination... because such a decision implicates legal and policy considerations. (721 F.2d at 85)

The question of uncertainty in calculating back-pay awards was addressed in Goss v. Exxon Office Systems Co., 747 F.2d 885 (CA 3d 1984) where the Court said:

The risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim. (747 F.2d at 889)

With respect to the effect the petitioner's conduct should have upon a Court's Title VII back pay award, this Court has stated:



Although back pay is an equitable remedy and its award is subject to the discretion of the Court, the court may not bar plaintiff when his conduct was reasonable under the circumstances. Waddell v. Small Tube Products, Inc., 799 F.2d 69, at 78 (CA 3d 1986).

Each of the above statements of policy of law plays a role in the proper disposition of this case.

2. THERE WAS AN ABUSE OF THE DISTRICT COURT'S DISCRETION

In ruling that Petitioner was only entitled to back-pay for the years 1974-1978 the trial court focused upon three points. First, that she resigned from a teaching position she obtained with a private academy in 1980. Second, that she did not apply for teaching positions "with several neighboring school districts." And third, that the state job service had no record



of an employment application for Miss Ellis "on file earlier than 1984."

Yet in setting forth its reasons for curtailing Petitioner's back-pay recovery, the Court omitted certain compelling counterpoints. With respect to Petitioner's resignation from Tolatr Academy, it should be noted that the academy is located in the East End of Pittsburgh, more than twenty-five miles from Petitioner's home; that she was forced to rely on bus transportation in commuting to the school; and that she was therefore, constrained to be away from home from 6:00 a.m. until after 6:00 p.m. Surely a resignation under those conditions is "reasonable under the circumstances." Waddell v. Small Tube Products Inc., supra, 779 F.2d at 78; hence, that resignation should not mitigate against the petitioner's full recovery of backpay here.



As to the second point, it is clear that the petitioner did in fact apply for positions with other school districts. But after receiving no responses to her initial applications - and being aware of the attitude toward blacks which prevailed in the area - she became discouraged with finding a teaching position in Washington County.

Finally, with regard to the filing of an employment application with the state job service, it is common knowledge that such services are ineffective in placing applicants and in the majority of cases serve only to qualify applicants for unemployment compensation.

Furthermore, it is undisputed that Petitioner did engage in least parttime employment as a cleaning woman during the period in question, work which would hardly be appetizing to a shirker. Indeed she has been employed throughout her entire adult life.



It must be remembered that the Ringgold School District was the wrongdoer here. After a fair presentation of the evidence on liability, Ringgold was found to have "purposefully" discriminated against the petitioner "because of her race." "The risk of lack of certainty with respect to the projections of lost income must be borne by the wrongdoer, not the victim." Goss v. Exxon Office Systems Co., supra, 747 F.2d at 889. And as the wrongdoer, the Ringgold District should "make no claims whatsoever on the Chancellor's conscience." Albemarle Co. v. Moody, supra, 45 L.Ed.2d at 299

3. THE DISTRICT COURT SHOULD HAVE ORDERED THE RINGGOLD SCHOOL DISTRICT TO REINSTATE RUTH ELLIS AS A PERMANENT ELEMENTARY SCHOOL TEACHER WITH SENIORITY RIGHTS RETROACTIVE TO 1974.

Following the trial on liability, Ruth Ellis requested the District Court to order her reinstatement as a permanent elementary school teacher with the Ringgold District with seniority



retroactive to 1974. Inasmuch as it was found that Miss Ellis was the victim of employment discrimination dating to 1974 as well as having been retaliated against for the filing of an administrative charge, such an order should have been entered.

Reinstatement with retroactive seniority rights is a recognized Title VII remedy. Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 444 (1976); International Brotherhood of Teamsters v United States, 431 U.S 324 07 S.Ct. 1843, 52 L.Ed.2d 396 (1977); Zipes v. TWA, 455 U.S. 385 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982); United States v. Int'l. Union of Elevator Constructors, 538 F.2d 1012 (CA 3d 1976). Indeed at least one Court has called reinstatement a "presumptive" remedy in Title VII cases, Darnell v. City of Jasper, Ala., 730 F.2d 653 (CA 11th 1984), saying:

...reinstatement is a basic element of the appropriate remedy in wrongful

discharge cases and except in extraordinary cases, is required...The rule of "presumptive reinstatement" in wrongful discharge cases follows the notion that money damages will seldom suffice to make whole persons who are unlawfully discriminated against in the employment environment. (730 F.2d at 655)

In other words, an order granting backpay does not adequately redress the wrong done a victim of discrimination. Something more is needed. And that something more is an order commanding the employer to put the employee into the position he or she would have been in had there been no discrimination.

Notwithstanding the petitioner's specific prayer for reinstatement, the District Court did not address the question of reinstatement in its opinion. Thus the appellant has been left without a statement of the Court's rationale for denying reinstatement.

It certainly cannot be argued that Miss Ellis is somehow ineligible for a teaching

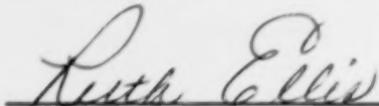


position. For the evidence adduced in court clearly speaks to the contrary. It is therefore suggested that Miss Ellis should have been granted reinstatement with seniority retroactive to 1974 and that the District Court abused its discretion in failing to grant reinstatement.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,


Ruth Ellis
Ruth Ellis, Petitioner



APPENDIX



MEMORANDUM OPINION OF THE COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 88-3164

RUTH ELLIS, Appellant

v

RINGGOLD SCHOOL DISTRICT, Respondent

Filed May 15, 1989

Appeal from the United States District Court for
the Western District of Pennsylvania
(Civil No. 83-2617)

District Judge: Honorable Gerald J. Weber
Submitted Under Third Circuit Rule 12(6)

May 11, 1989

PRESENT: SEITZ, COWEN and GARTH, Circuit Judges.



- MEMORANDUM OPINION OF THE COURT

SEITZ, Circuit Judge.

This is the second appeal by plaintiff, a former elementary school teacher, based on her race discrimination charge against the Ringgold School District.

Plaintiff obtained a jury verdict in her favor on the liability issue. The damage claim was then decided by the court. The district court granted limited back pay and plaintiff appealed. She contended that the back pay was inadequate and that the district court did not address her request for reinstatement. Our court affirmed the amount of the back pay awarded but remanded the reinstatement issue for the district court to determine. Ellis v. Ringgold School Dist., 832 F.2d 27 (3d Cir. 1987). On remand the district court denied reinstatement, and denied front pay



as an alternative, and this pro se appeal followed.

The district court denied reinstatement because of its determination that the relationship between the parties was so fractured that there could be no functional relationship. We are not prepared to say that its determination constituted an abuse of discretion on this record despite a preference for reinstatement as a remedy in this type of case.

The district court also concluded that front pay was an inappropriate alternative because of plaintiff's limited failure to mitigate in connection with her back pay claim.

Although plaintiff did not request front pay as an alternative to reinstatement, we address that remedy because the district court did so. We do not believe that failure to mitigate as to a back pay claim is necessarily dispositive of a front pay claim for damages as an alternative to



reinstatement. After all, front pay deals, presumably, with the time after a determination of liability. However, there is no evidence in the record as to what would be reasonable front pay and whether it might be diminished by other factors. Furthermore, plaintiff did not request that the record be supplemented after the remand.

We therefore conclude on this record that no factual basis was developed for awarding front pay. Consequently, the order of the district court will be affirmed on that ground.

To the Clerk of the Court:

Please file the foregoing memorandum opinion

/s/
Circuit Judge



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3164

RUTH ELLIS,
Appellant

v.

RINGGOLD SCHOOL DISTRICT,

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, HIGGINBOTHAM,
SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHISON, SCIRICA, COWAN AND NYGAARD, Circuit
Judges, GARTH* AND SEITZ**, Senior Circuit Judges

The petition for rehearing filed by
appellant in the above-entitled case having been

*As to panel rehearing.

**Since the hearing of this case, Judge
Seitz has taken senior status.



submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

/s/
Circuit Judge

Dated: August 22, 1989



OPINION OF THE DISTRICT COURT

In the United States District Court
For the Western District of Pennsylvania

RUTH ELLIS)
Plaintiff)
v.) Civil Action
Defendant) No. 83-2617
RINGGOLD SCHOOL DISTRICT)
)

O P I N I O N

WEBER, D.J.

After a Jury verdict in plaintiff's favor on liability in this race discrimination suit, the issue of damages was tried to the Court. We subsequently issued an Opinion and Order in which we concluded that plaintiff was entitled to back pay for several years, but by her failure to mitigate damages, she had forfeited any right to further relief.



Plaintiff, unsatisfied with a judgment for back wages and attorney's fees, filed a pro se notice of appeal, apparently against the advice of her trial counsel. On appeal, the circuit affirmed our factual and legal determinations on back pay and plaintiff's failure to mitigate, but noted that we had not specifically addressed plaintiff's claim for reinstatement. Therefore, the matter was remanded for consideration of reinstatement as an appropriate remedy.

We rely on the existing record and the briefs previously submitted by the parties on reinstatement. We have seen no need for additional submissions on remand and neither side has requested opportunity to add to the record or briefs.

Reinstatement is of course an equitable remedy, within the discretion of the court. It is a favored remedy in a Title VII action and should be awarded where appropriate.



In this case though, we have already determined that plaintiff failed to satisfy her obligation to mitigate damages and that determination has been affirmed on appeal. Defendant demonstrated that plaintiff voluntarily quit one job,¹ failed to apply for teaching jobs in neighboring school districts, and failed to maintain a job application with the Pennsylvania Unemployment Office.

These omissions not only cost plaintiff her equitable right to back pay, but her right to reinstatement as well. Plaintiff has no teaching position today at least in part because she has not diligently sought to obtain or maintain a teaching position. We will not alleviate that condition of her own making by imposing her on the defendant. Reinstatement is an equitable

1/ We consider plaintiff's reasons for quitting this job, the need to ride two buses on a long commute, to be unpersuasive.

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remedy and where plaintiff has failed to satisfy her obligations she loses the equitable advantage. She chose to forego certain obvious avenues to teaching jobs, denying herself the opportunity to be made whole. For this reason we conclude, as we did in our prior opinion, that plaintiff's failure to mitigate results in forfeiture of all further relief. See, e.g., Brito v. Zia Co., 478 F.2d 1200, 1204 (10th Cir. 1973).

Reinstatement is also inappropriate where the relationship between the parties is so strained as to effectively preclude a functional work relationship. Here, the antagonism and personal animosity between the litigants has been plainly evident at both stages of the trial. This was not merely the contentiousness of competing litigants but earnest and deep-set personal bitterness which has always bubbled at or near the surface. Such emotions would be

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counterproductive in any employment setting, but could carry disastrous results in a teacher/administration relationship, to the considerable detriment of the school and its children. Plaintiff would chafe at every instruction or criticism and, school administration would bristle at the first sign of resistance. In the face of the high degree of personal animosity here, and in the absence of any injunctive direction that would insure peace, we must conclude that reinstatement is not a viable remedy here. Front pay is an inappropriate alternative because of plaintiff's failure to mitigate.

Finally, we note that defendant demonstrated at trial that there were no openings available with the District at that time. Only one new teacher had been hired in the 3 previous years, and that one was part of settlement of a tenure lawsuit. However, we do not know what current



prospects are for reinstatement, and given our decision above, we do not believe it necessary to ascertain them at this time.

Finally, we note that plaintiff has filed a petition seeking an additional award of attorney's fees for time spent on appeal. Although plaintiff succeeded in having her case remanded to us, plaintiff has ultimately failed on the reinstatement issue. Because plaintiff has not prevailed on this issue, an award of fees is not appropriate.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUTH ELLIS)	
)	Plaintiff
)	
v.)	Civil Action
)	No. 83-2617
RINGGOLD SCHOOL DISTRICT)	
)	Defendant

O R D E R



AND NOW, in accord with the accompanying Opinion, it is hereby ORDERED:

1) Plaintiff's claim for reinstatement is DENIED.

2) Plaintiff's Notion for Attorney's Fees is DENIED.

3) The Clerk is DIRECTED to mark this matter CLOSED.

SO ORDERED this day of 17th February, 1988.

/s/
GERALD J. WEBER
United States District Judge

cc: Paul J. McArdle, Esq.
1001 Manor Building
564 Forbes Avenue
Pittsburgh, PA 15219

George B. Stegenga, Esq.
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3092

RUTH ELLIS,
Appellant

v.

RINGGOLD SCHOOL DISTRICT,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil No. 83-2617)

Submitted Pursuant To Third Circuit Rule 12(6)

August 19, 1987

Before: GIBBONS, Chief Judge,
and WEIS, Circuit Judge, and
KELLY. *District Judge

Filed October 29, 1987

* The Honorable James McGirr Kelly, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.



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OPINION OF THE COURT

WEIS, Circuit Judge.

After finding that defendant had discriminated against plaintiff when it declined to hire her as a permanent teacher, the district court granted partial back pay but failed to address her request for reinstatement. We will remand for a ruling on that issue. Furthermore, we observe that accepting employment in another field may be consistent with a duty to mitigate

damages and not necessarily evidence of abandonment of one's profession.

Responding to special interrogatories, a jury found that defendant school district had been guilty of racial discrimination when it did not hire plaintiff as a permanent teacher in 1974. In a bench trial she was awarded \$24,596.68 in lost earnings and \$7,734.95 in attorney's fees.

In 1974 after receiving a provisional teaching certificate, plaintiff applied for a full-time teaching position with the Ringgold School District near her home in Donora, Pennsylvania. She was accepted as a "full-time substitute" and taught in the elementary school for the 1974-75 and 1975-76 terms. In August 1976, after a third denial of full-time status, plaintiff filed complaints with the EEOC and the Pennsylvania Human Rights Commission. The school



district thereafter gave her only fifteen days of work as part-time substitute.

In 1978 plaintiff found employment at a munitions plant and continued there until it closed in 1980. Her salary exceeded what she would have earned as a full-time teacher. In 1981 she taught at a private academy in Pittsburgh, but left after one semester because the position required that she commute fifty miles daily. Thereafter, until trial, plaintiff worked as a janitress and received compensation for acting as a foster parent. She also received twelve credits for post-graduate work she completed.

The court found that the difference between her actual earnings and what she would have received as a full-time teacher at Ringgold between 1974 and 1978 amounted to \$24,596.68. Defendant does not dispute that calculation. Plaintiff made no claim for back pay during the period she worked at the munitions factory. No

recovery was allowed for lost earnings after 1980.

At the conclusion of the evidence on damages, the trial judge commented, "Everyone will recognize that the testimony of the plaintiff on her obligation to mitigate has been very weak, and the testimony of the plaintiff on what amount she earned from other sources is weak and not very credible." In his memorandum opinion the judge wrote: "Plaintiff's voluntary relinquishment of a teaching position and her failure to explore several obvious avenues to employment preclude recovery for back pay following her lay off in 1980." The opinion did not discuss the plaintiff's request for reinstatement, and the final judgment did not include any reference to the subject.

Plaintiff did not file any request for modification of the judgment in the district court but instead appealed to this court. On

appeal she contends that the district court erred in denying back pay through the date of the trial and in failing to direct reinstatement.

Once the jury found discrimination under Title VII of the Civil Rights Act of 1964, plaintiff became entitled to an appropriate remedy under 42 U.S.C. §2000e-5(g). The statute provides that the court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement ...with or without back pay..., or any other equitable relief as the court deems appropriate." However, a plaintiff is required to mitigate damages: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

In Waddell v. Small Tube Products, Inc., 799 F.2d 69, 78 (3d Cir. 1986), this court concluded that "[a]lthough back pay is an equitable remedy



and its award is subject to the discretion of the district court, the court may not bar plaintiff when his conduct was reasonable under the circumstances." But in Craig v. Y & Y Snacks, 721 F.2d 77, 82 (3d Cir. 1983), we observed that the "statute does provide for a deduction from a back pay award for 'Interim earnings' or 'amounts earnable with reasonable diligence.' [citation omitted] Thus, a duty to mitigate damages is incorporated."

The district court applied the correct legal principles in considering the back pay award; therefore the plaintiffs objection to the issue on the amount of the judgment rests on factual findings which we may not overturn unless we are convinced they are clearly erroneous. Fed. R. Civ. P. 52. This is true particularly when, as here, the trial court based its findings on the credibility of a party. The judge's comments at the conclusion of the testimony reflected his



reservations about the plaintiff's credibility when testifying about employment after 1980. On this record we cannot say that the district court's findings are clearly erroneous and therefore we must affirm the judgment on back pay.

The district court, however, did not resolve the reinstatement issue. The evidence established that at the time of trial plaintiff was qualified to teach in the Commonwealth of Pennsylvania. Her post-graduate studies, through which she earned an additional twelve credits at an accredited university, demonstrated her desire to continue in that field.

The school district contends that plaintiff abandoned her profession in 1978 when she took a higher paying position in industry, and therefore the trial court did not abuse its discretion in failing to direct reinstatement. The argument would have greater force if, in fact, the court



had denied reinstatement. But the district judge did not discuss the subject. Silence in these circumstances does not amount to a finding of abandonment, nor even a ruling that reinstatement was refused. Failure to address the issue was most likely an oversight, which could have been called to the trial judge's attention by a motion for modification of the judgment under Fed. R. Civ. P. 59.

As noted earlier, plaintiff was responsible for mitigating her damages by seeking other employment. That obligation compels a plaintiff to seek "amounts earnable with reasonable diligence." Craig v. Y & Y Snacks, 721 F.2d at 82. The duty of mitigation may require that a plaintiff accept a lower paying position if one equivalent to that from which she was barred is unavailable. Ford Motor Company v. EEOC, 458 U.S. 219, 231 n.6 (1982).



Standing alone, the fact that a plaintiff takes a job in an unrelated field to meet her obligation of mitigation should not be construed as a voluntary withdrawal from her former profession. Otherwise, a plaintiff would be put in the intolerable position of choosing between foregoing a source of earnings during the interim before trial or risking an adverse finding on abandonment of her profession.

Such a rule would also work to the disadvantage of employers because the scope of the mitigation obligation necessarily would be relaxed. It is conceivable that a plaintiff, wronged by discrimination, would decline to take a job that would substantially mitigate damages because such employment could be construed as an abandonment of her former vocation. Thus the abandonment argument, which the school district advances, would place plaintiff in an untenable economic position at the same time that it



discourages efforts at mitigation. To prove abandonment of a profession, defendant must show more than that plaintiff merely secured alternative employment.

Reinstatement is the preferred remedy to avoid future lost earnings. Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985), cert. denied, 474 U.S. 1057 (1986). It is an obvious form of relief to make the plaintiff whole and to relieve the plaintiff of the effects of discrimination. Although within the discretion of the district court, a reinstatement order should be considered when requested by the plaintiff and when circumstances warrant its award. See Garaza v. Brownsville Independent Sch. District, 700 F.2d 253 (5th Cir. 1983). See also Protos v. Volkswagen of America, Inc., 797 F.2d 129 (3d Cir. 1986) (court ordered reinstatement as remedy for violation of Title VII by employer who failed to reasonably



accommodate plaintiffs religious practices), cert. denied, 107 S. Ct. 474; Johnson v. Orr, 776 F.2d 75 (3d Cir. 1985) (reinstatement denied because plaintiffs no longer satisfied federal statutory requirement that they remain members of military unit), cert. denied, 107 S. Ct. 107 (1986). However, the court may deny reinstatement to a plaintiff when, for example, animosity between the parties makes such a remedy impracticable. Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 E.2d 253, 261 (3rd Cir. 1986). Because the record does not reveal the district court's views on reinstatement, we shall remand the case so that the issue may be addressed.

Related to a reinstatement order is the question of seniority. In Franks v. Bowman Transp. Co., 42 U.S. 747, 771 (1976), the Court determined that seniority can be denied by the district court "only for reasons which, if



applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." But the Court cautioned: "We are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts." *Id.* at 770. It follows that, if the district court in its discretion determines that plaintiff should be reinstated or hired as a full-time teacher in the Ringgold School District, the question of retroactive seniority should also be resolved.

The judgment of the district court in the amount of \$24,596.68 and the order directing the payment of attorney's fees will be affirmed. The case will be remanded so that the district court may determine whether to direct reinstatement



and, if so, whether to award retroactive seniority as well.

A True copy:

Teste:

Clerk of the United State Court of Appeals
for the Third Circuit



MEMORANDUM OPINION OF THE DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUTH ELLIS)
Plaintiff)
)
v.) Civil Action
) No. 83-2617
RINGGOLD SCHOOL DISTRICT)
Defendant)

MEMORANDUM OPINION

WEBER, D.J.

Plaintiff alleged discrimination in hiring for elementary school teacher. Following a jury verdict in plaintiff's favor on liability grounded solely on Title VII, we held a non-jury trial on damages. Significant questions were raised concerning plaintiff's efforts at mitigation and her certification for a teaching



position.¹ We conclude that while plaintiff is entitled to back pay for the school years from fall 1974 to spring 1979, plaintiff's failure to make substantial efforts to mitigate damages after that time precludes further recovery.

Plaintiff was hired in August 1974 as a substitute teacher. She taught full-time as a substitute in the 1974-75 and 1975-76 school years, but worked only 15 days in 1976-77. During this period she was passed over for a permanent position. The jury concluded that the failure to hire plaintiff as a permanent teacher, and the reduction in work in 1976-77, were discriminatory.

¹ On the record before us we conclude that plaintiff's certification did not expire prior to 1979 and because of our findings on the mitigation issue, there is not need to consider the certification issue for the period after 1979.



Based on the jury's finding that she should have been hired as a full-time teacher in fall 1974, plaintiff is entitled to the difference between what she would have earned in that position and what she earned in actual fact. Exact dollar amounts are difficult to come by, in part because plaintiff had outside unreported income, and in part because we are comparing tax year earnings with school year pay rates. However, plaintiff's estimation of loss for the period 1974 to 1978, contained in plaintiff's proposed remedies, appears to be reasonably accurate. The amount of the loss:

1974	\$ 1,470.00
1975	1,375.00
1976	5,527.50
1977	9,947.00
1978	<u>6,277.18</u>

Total \$24,596.68

Plaintiff makes not claim for back pay in 1979 because she obtained employment in a

munitions factory which paid more than she would have earned teaching. Sometime in 1980 that plant closed. Plaintiff was laid off and drew unemployment compensation.

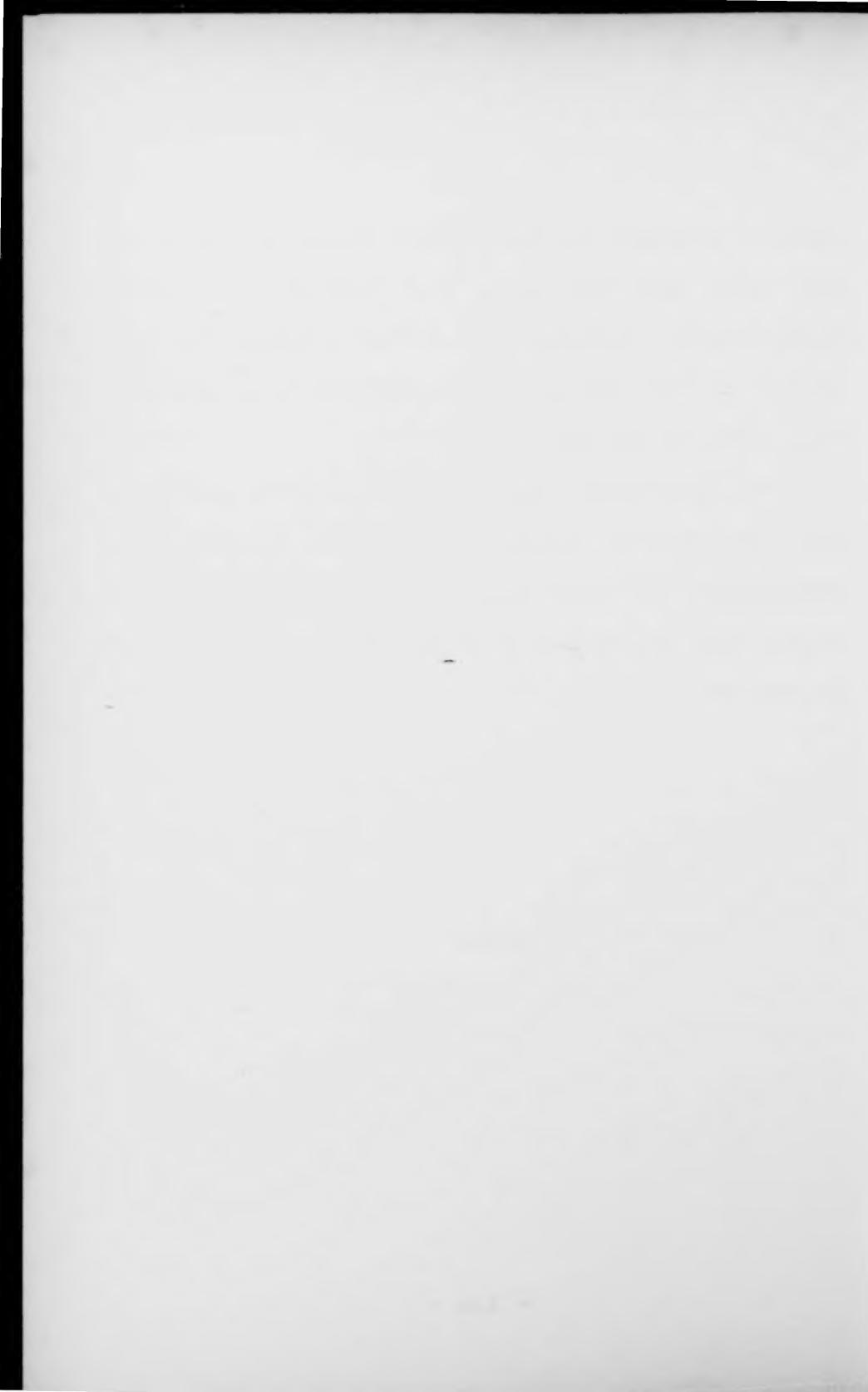
Plaintiff's effort at mitigation after 1980 is the most significant issue in this litigation. It is clear that she did secure a teaching position with a private academy in 1980, but she admits that she quit that job because she had to take two buses to get to and from work. It is also clear that plaintiff failed to apply for teaching positions with several neighboring school districts. Finally, the state job service office had no records of an employment application on file earlier than 1984, indicating at the least that plaintiff failed to timely renew her application with that agency or at worst that she never filed one.

Plaintiff's voluntary relinquishment of a teaching position and her failure to explore



several avenues to employment preclude recovery for back pay following her lay-off in 1980. Accordingly, judgment will be entered in the amount of \$24,596.68, representing back pay for fall 1974 to spring 1979.

We have also received plaintiff's petition for attorney's fees. The fee request is reasonable in this type of case and fees and costs will therefore be awarded in the amount of \$7,734.95.



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

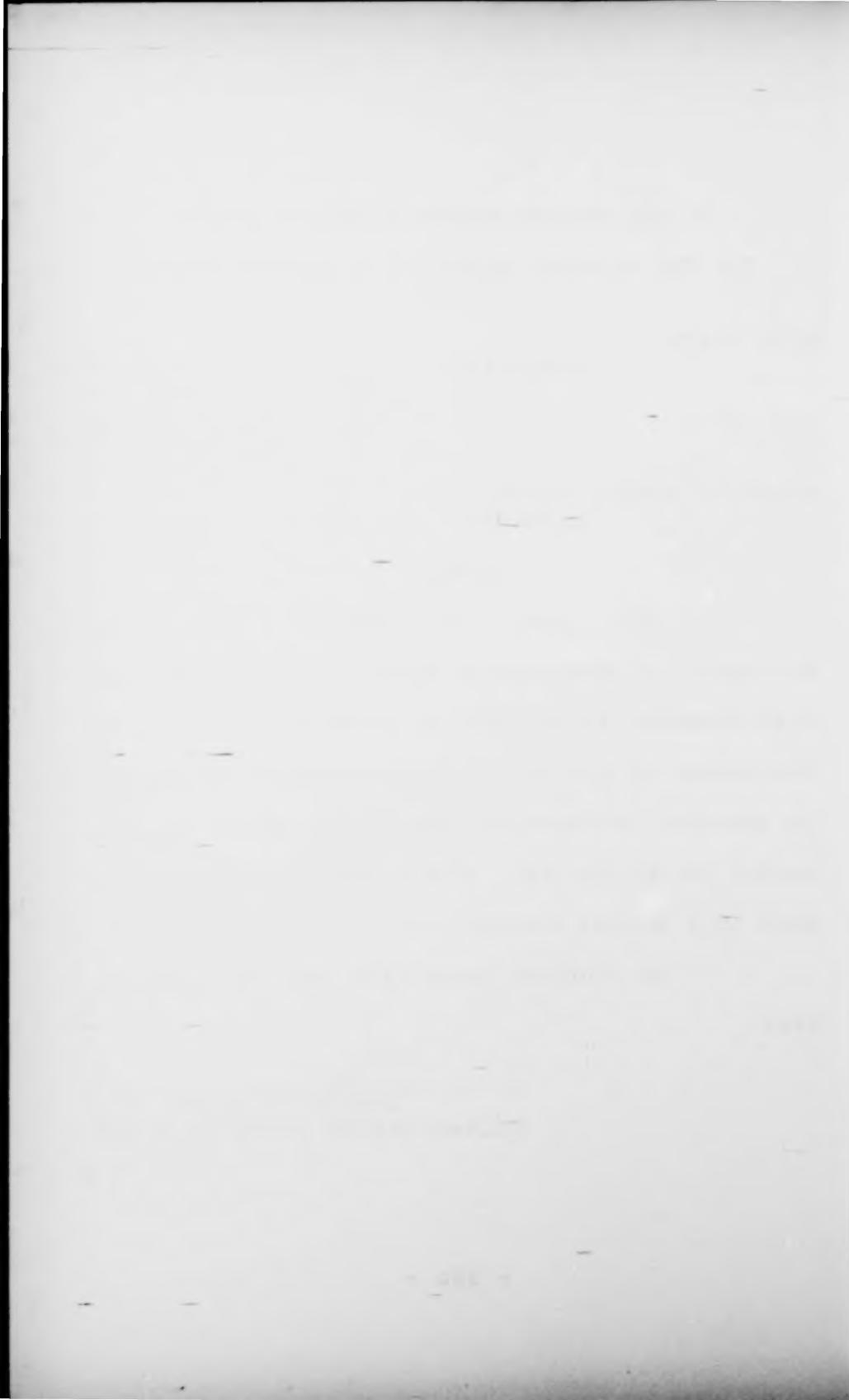
RUTH ELLIS)
Plaintiff)
v.) - Civil Action
RINGGOLD SCHOOL DISTRICT) No. 83-2617
Defendant)

ORDER

AND NOW, in accord with the accompanying Memorandum Opinion, IT IS ORDERED that JUDGMENT is ENTERED in favor of plaintiff in the amount of \$24,596.68. Furthermore, plaintiff is awarded attorney's fees and costs in the amount of \$7,734.95. The Clerk is DIRECTED to mark this matter CLOSED.

SO ORDERED this 14th day of January,
1987.

/s/
GERALD J. WEBER
United States District Judge



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